

## RE-EXAMINING PROSECUTORIAL DISCRETION IN THE CONTEXT OF S 300(A) MURDER AND S 299 CULPABLE HOMICIDE

NICHOLAS KHONG

### I. INTRODUCTION

Article 35(8) of the Constitution of the Republic of Singapore<sup>1</sup> confers on the Attorney-General the “*power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence*”. In other words, the Attorney-General has control over whether a suspect should be charged, and which charge should be brought against a suspect. Such prosecutorial discretion is required for a fair and effective criminal justice system.<sup>2</sup> The alternative, “automatic prosecution” of all suspected criminal offences, is untenable as it would likely harm the public interest and overwhelm our criminal justice system.

However, the Singapore Court of Appeal [SGCA] recognised in *Chng Suan Tze v. Minister for Home Affairs*<sup>3</sup> that unfettered discretion would be inconsistent with any conception of the rule of law, since all legal powers should have legal limits.<sup>4</sup> To this end, prosecutorial discretion should be re-examined in the context of murder under Section 300(a) of the Penal Code<sup>5</sup> [s 300(a)] and culpable homicide under the first limb of Section 299 of the Penal Code [s 299]. Specifically, prosecutorial discretion in this context should be premised on two additional mechanisms: an obligation to explain its decisions, as well as published, non-binding and specific guidelines.

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<sup>1</sup> 1999 Rev Ed Sing.

<sup>2</sup> Kumarlingam Amirthalingam, “Prosecutorial Discretion and Prosecution Guidelines” (2013) Sing JLS 50 at 57.

<sup>3</sup> [1988] SGCA 16; [1988] 2 SLR(R) 525.

<sup>4</sup> Chen Siyuan, “The Limits of Prosecutorial Discretion in Singapore: Past, Present and Future” (2013) 1 International Review of Law 1 at 11-12.

<sup>5</sup> Cap 224, 2008 Rev Ed Sing.

## II. CONSEQUENCES OF PROSECUTORIAL DISCRETION IN MURDER AND CULPABLE HOMICIDE

In *Public Prosecutor v P Mageswaran and another appeal*<sup>6</sup> [*Mageswaran*], the SGCA observed that s 300(a) and the first limb of s 299 have exactly the same elements, namely: (1) an intention to kill the victim; and (2) an act which caused the victim's death.<sup>7</sup> It should be noted that an accused person could be charged under the first limb of s 299 if one or more of the Exceptions to s 300(a) are applicable. However, the prosecution may exercise their discretion to charge the accused person under s 299 even though none of the Exceptions to s 300 apply. This came to the fore in *Mageswaran*, where the accused was charged with an offence under the first limb of s 299, even though the accused did not have any partial defences open to him.<sup>8</sup>

Further, the SGCA has noted that the exercise of prosecutorial discretion has enhanced importance in such a context.<sup>9</sup> While a charge under the first limb of s 299 only attracts a term of imprisonment, a charge under s 300(a) attracts the mandatory death penalty. Hence, where an accused person's act fulfils the essential elements of the above offences, whether he faces life imprisonment or death depends almost entirely on prosecutorial discretion.

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<sup>6</sup> [2019] SGCA 22; [2019] 1 SLR 1253.

<sup>7</sup> *Supra* note 6 at para 35.

<sup>8</sup> With respect, it is submitted that the SGCA in *Mageswaran* and the authors of Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 3rd Ed (Singapore: LexisNexis, 2018) may have wrongly cited *Dewi Sukowati v Public Prosecutor* [2017] SGCA 8 [*Dewi Sukowati*] as another instance of a scenario where the accused person was charged under the first limb of s 299 even though no partial defence was open to the accused. In *Dewi Sukowati*, both the SGHC's and SGCA's judgements noted at para 42 and para 14 respectively that Dr Kenneth Koh of the Institute of Mental Health was of the opinion that the accused person qualified for the partial defence of diminished responsibility under Exception 7 to s 300 of the Penal Code. This was the likely reason why the prosecution had charged the accused under the first limb of s 299 rather than under s 300(a) of the Penal Code. Nonetheless, such ambiguity could have been avoided if the prosecution had an obligation to explain its exercise of prosecutorial discretion in such a context.

<sup>9</sup> *Supra* note 6 at paras 34-37.

### III. AN OBLIGATION TO EXPLAIN PROSECUTORIAL DECISIONS IN THE CONTEXT OF MURDER AND CULPABLE HOMICIDE

Notably, in *Mageswaran*, the SGCA inferred that the prosecution had decided to charge the accused person under the first limb of s 299 because the mandatory death penalty was not warranted in that case, “*having weighed all the relevant circumstances in the exercise of prosecutorial discretion*”.<sup>10</sup> Following the case of *Ramalingam Ravinthran v Attorney-General*<sup>11</sup> [*Ramalingam*], where the SGCA held that the prosecution is generally not required to give reasons for prosecutorial decisions,<sup>12</sup> the court in *Mageswaran* was entitled to make such an inference. However, the prosecution’s exact reasons for charging the accused person under s 299 in *Mageswaran* remain unknown, and it is argued that the prosecution should have an obligation to give reasons for its prosecutorial decisions in the present case where the life of an accused person depends almost entirely on the exercise of prosecutorial discretion.

On the surface, *Mageswaran* does not imply a need for this obligation, since the accused person was charged under s 299 rather than the relatively graver offence under s 300(a). However, this need becomes pertinent when the prosecution exercises their discretion in the converse situation. An accused person who is charged with s 300(a), and to whom the Exceptions to s 300 do not apply, would naturally question why the prosecution exercised their discretion differently in *Mageswaran*.

The Attorney-General’s Chambers (AGC) has raised two main arguments against any general obligation to explain prosecutorial decisions.<sup>13</sup> Unfortunately, these arguments are neither convincing nor satisfactory in the specific context of s 299 and s 300(a).

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<sup>10</sup> *Ibid* at para 37.

<sup>11</sup> [2012] SGCA 2; [2012] 2 SLR 49.

<sup>12</sup> *Ibid* at paras 74-78.

<sup>13</sup> Attorney-General’s Chambers, “The Exercise of Prosecutorial Discretion” (January 2012), *Attorney-General’s Chambers*, online <<https://www.agc.gov.sg/docs/default-source/newsroom-documents/media-releases/2012/agcpressrelease200112-theexerciseofprosecutorialdiscretion.pdf>>.

A. *Delayed prosecutions and undermined prosecutorial effectiveness?*

Firstly, the AGC argues that an obligation to explain its prosecutorial decisions in every case would delay criminal proceedings and undermine prosecutorial effectiveness, as it would likely result in frequent challenges to the courts by dissatisfied parties.<sup>14</sup>

However, this obligation need not extend to every case, and an exception for cases where s 299 and s 300(a) are concerned can be made on the ground that prosecutorial discretion has enhanced importance here.<sup>15</sup> This would be a more principled approach as opposed to one that relies on public sentiments.<sup>16</sup> Such an approach would also accord with the Chief Justice Sundaresh Menon's recent pronouncement in *Han Fang Guan v Public Prosecutor*<sup>17</sup>, that “*the liberty of individuals should not be dependent on discretionary powers when they may be dealt with in a principled way*”.<sup>18</sup>

Further, frequent challenges to the courts can be justified by the fact that, if there was indeed a prosecutorial mistake, it is the accused person who suffers an irreversible and unjustified loss of life or liberty.<sup>19</sup> This would be consistent with Singapore's gradual shift away from the crime control model of criminal justice by introducing further due process safeguards.<sup>20</sup>

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<sup>14</sup> *Ibid* at para 11.

<sup>15</sup> *Supra* note 6 at para 36.

<sup>16</sup> In their press statement on the exercise of prosecutorial discretion, *supra* note 14 at para 12, the AGC has stated that “*where the reason for prosecuting or not prosecuting raises a question of importance for the public and disclosure would not impact the proper resolution of the case, the Attorney-General's Chambers does consider providing at least brief reasons for its decision, so that confidence in the justice system may be maintained*”. See for example Ng Huiwen, *Death of Annie Ee: AGC explains why couple who abused her were not charged with murder* (December 2017), online, <<https://www.straitstimes.com/singapore/death-of-annie-ee-agc-explains-why-couple-who-abused-her-were-not-charged-with-murder>>.

<sup>17</sup> [2020] SGCA 11.

<sup>18</sup> *Ibid* at para 117.

<sup>19</sup> Gary Kok Yew Chan, “Prosecutorial Discretion and the Legal Limits in Singapore” (2013) 25:1 SAclJ. 15.

<sup>20</sup> Keith Jieren Thirumaran, “The Evolution Of The Singapore Criminal Justice Process” (2019) 31 SAclJ. 1042. See also the SGCA's recent ruling in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25, where the court held that, in addition to the obligations established in *Muhammad bin Kadar and another v Public Prosecutor* [2011] SGCA 32, the prosecution also has the obligation to disclose the statements of material witnesses even if the said witness was not called by the prosecution to testify.

*B. Attorney-General's ability to exercise prosecutorial discretion undermined?*

Secondly, the AGC asserts that any obligation to explain its prosecutorial decisions “*which runs counter to the judicial deference shown by the courts to the Attorney-General's discretion would impair the performance of a core executive function designated in the Constitution*”.<sup>21</sup>

However, it is unclear as to why such an obligation would necessarily impair the Attorney-General's ability to “*institute, conduct or discontinue*”<sup>22</sup> proceedings for an offence. The AGC has occasionally explained their reasons for certain prosecutorial decisions, and their prosecutorial discretion does not appear to have been impaired in such instances.<sup>23</sup> Instead, explaining prosecutorial decisions appears to be complementary to the functions of the Attorney-General in this context. Such an obligation would provide clarity to accused persons who could potentially face the death penalty for their offences.

Further, greater transparency in the exercise of prosecutorial discretion, as opposed to an opaque blanket of secrecy, would bolster public trust and confidence in the AGC.

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<sup>21</sup> *Supra* note 13 at para 10.

<sup>22</sup> *Supra* note 1.

<sup>23</sup> See for example: Ng Huiwen, “Death of Annie Ee: AGC explains why couple who abused her were not charged with murder” (December 2017), *The Straits Times*, online, <<https://www.straitstimes.com/singapore/death-of-annie-ee-agc-explains-why-couple-who-abused-her-were-not-charged-with-murder>>; Attorney-General's Chambers, “PP v Joshua Robinson” (March 2017), *Attorney-General's Chambers*, online <<https://www.agc.gov.sg/docs/default-source/newsroom-documents/media-releases/2017/agc-press-release-jr-8-mar-17bd1400354dcc63e28975ff00001533c2.pdf>>; and Amelia Teng, “NUS Peeping Tom given conditional warning due to high likelihood of rehabilitation: Police” (23 April 2019), *The Straits Times*, online: <<https://www.straitstimes.com/singapore/courts-crime/student-in-nus-sexual-misconduct-case-given-conditional-warning-due-to-high>>.

#### IV. SPECIFIC GUIDELINES TO PROMOTE TRANSPARENCY IN DECISION MAKING

Given that the life or death of an accused person hinges largely on prosecutorial discretion in this context, prosecutorial discretion should also be guided by published, non-binding and specific guidelines.<sup>24</sup> This would encourage greater scrutiny of prosecutorial decisions beyond the AGC and promote consistent decision-making by the prosecution.

Parliament can further preserve the flexibility of prosecutorial discretion and abate concerns about new defences arising from these guidelines by enacting the appropriate legislation; that is, legislation which provides that non-compliance with these guidelines does not give the accused a cause of action against the prosecution.<sup>25</sup>

While the AGC has argued that the publication of specific guidelines could lead to an increase in offending in areas where the prosecution might exercise restraint,<sup>26</sup> this is not a concern in the present context. An accused person who is guilty of an offence under the first limb of s 299 faces imprisonment for life or imprisonment for a term of up to twenty years.<sup>27</sup> This sentencing regime still poses a strong deterrent to potential offenders. Therefore, it is unlikely that there will be more offenders simply because the prosecutorial guidelines imply an imprisonment sentence of up to twenty years or for life, instead of the death penalty.

#### V. THE COURT AS A CHECK AND BALANCE?

Notably, the AGC has made the implicit assertion that the court serves as a check and balance against the arbitrary exercise of prosecutorial discretion. This is because it is the court who

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<sup>24</sup> The United States of America is one example of a jurisdiction which has adopted a similar approach to the publication of non-binding prosecutorial guidelines. See The United States Department of Justice, "Justice Manual", online: <<https://www.justice.gov/jm/justice-manual>>.

<sup>25</sup> *Supra* note 4.

<sup>26</sup> *Supra* note 13 at para 9.

<sup>27</sup> See s 304 of the Penal Code (Cap 224, 2008 Rev Ed Sing). Further, an offender who is sentenced to imprisonment for life is also liable to caning, and an offender who is sentenced to term imprisonment is also liable to fine or to caning.

ultimately determines the guilt of an accused person and the punishment that follows if the accused person is found guilty.<sup>28</sup>

However, this form of check and balance is significantly curtailed in the context of s 300(a) and the first limb of s 299. As the SGCA in *Mageswaran* stated, “*any exercise of prosecutorial discretion would inevitably have an impact on the outcome and the eventual sentence*”.<sup>29</sup>

It should be reiterated that the elements of the first limb of s 299 and s 300(a) are exactly the same, and it follows that where none of the Exceptions to s 300 apply, an accused person who fulfils the elements of the first limb of s 299 would also be able to fulfil the elements of s 300(a). Assuming that the accused person did indeed have an intention to kill, and performed an act which caused the victim’s death, it follows that the prosecution’s preferred charge is the crucial factor which draws the fork in the road between the mandatory death penalty and a term of imprisonment. This is especially so as the courts have evinced an unwillingness to question or interfere with the prosecution’s exercise of their discretion in such a context.<sup>30</sup> Therefore, where an accused person may be found guilty of both offences, it is the prosecution who effectively determines the sentence which follows the finding of guilt.

Further, the AGC’s reference to judicial review as a clear remedy for the unlawful or unconstitutional exercise of prosecutorial discretion is unsatisfactory.<sup>31</sup> Owing to the high office of the Attorney-General, a presumption of constitutionality applies to prosecutorial discretion.<sup>32</sup> This has the effect of placing the burden of proof on the accused to specifically produce *prima facie* evidence of (1) bad faith, or (2) a breach of his constitutional rights, for judicial review to be available.<sup>33</sup>

This is problematic, as the way in which this burden of proof can be discharged is uncertain and overly onerous on accused persons. In *Ramalingam*, the SGCA stated that the appellant in *Teh*

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<sup>28</sup> *Supra* note 13 at para 13.

<sup>29</sup> *Supra* note 6 at para 37.

<sup>30</sup> See *Ibid.*

<sup>31</sup> *Supra* note 13 at para 14.

<sup>32</sup> *Supra* note 11 at para 44.

<sup>33</sup> *Ibid* at paras 70-72.

*Cheng Poh v Public Prosecutor*<sup>34</sup>, who was prosecuted for a capital offence, could “*show prima facie impropriety [in the exercise of prosecutorial discretion] by producing evidence that another offender in similar circumstances had been prosecuted for a non-capital offence*”.<sup>35</sup> This is broadly analogous to our present case since an accused person can be charged with either a capital offence under s 300(a) or a non-capital offence under the first limb of s 299. However, there are two problems associated with such an approach.

Firstly, the phrase “*similar circumstances*” is not precisely defined. How similar must the circumstances be for an accused person to use *Mageswaran* as evidence to discharge this burden of proof?<sup>36</sup>

Secondly, the phrase “*had been prosecuted*” suggests that similar circumstances must be based on past, and not merely hypothetical events.<sup>37</sup> Hence, the accused person’s ability to rebut the presumption hinges on the availability of available precedents, which may or may not exist, or which may be inaccessible to the accused person.

These problems significantly impair the accused person’s ability to discharge the burden of proof. It could be briefly suggested that these issues may potentially be resolved by shifting the burden to the prosecution, who can readily produce evidence of their decision-making process. However, this inquiry warrants a much deeper examination, and is not within the scope of the present article.

In sum, the court’s role as a check and balance against the arbitrary exercise of prosecutorial discretion appears to be significantly curtailed in the context of the first limb of s 299 and s 300(a). It follows that greater transparency and accountability in the exercise of prosecutorial discretion is particularly desirable in this context.

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<sup>34</sup> [1979] 1 MLJ 50.

<sup>35</sup> *Supra* note 11 at para 26.

<sup>36</sup> *Supra* note 19 at para 42.

<sup>37</sup> *Ibid.*



## VI. CONCLUSION

Given the current sentencing regime that applies to the first limb of s 299 and s 300(a), the exercise of prosecutorial discretion in such a context is unjustifiably opaque. In view of the potential injustice that may be caused, one may even go so far as to say that the exercise of prosecutorial discretion in this specific context is dangerous. Therefore, it has been argued that an obligation to explain prosecutorial decisions, as well as the publication of non-binding and specific guidelines, would do much to ease these concerns.